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No. OFFICE OF THE CLERK

In The
Supreme Court of The United States
October Term 1996

JOHN H. HAPGOOD,

Petitioner,

v.

CITY OF WARREN,

Respondent.

Appeal to the Supreme Court of Ohio
from the Eleventh Appellate District
Ohio Court of Appeals for Trumbull County

PETITION FOR WRIT OF CERTIORARI
with Appendix

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51pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether an individual's state claim for retaliatory discharge arising from his or her filing of a state workers compensation claim is pre-empted by the federal Labor Management Relations Act concerning collective bargaining agreements.

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The caption of the case in this Court contains the names of all parties to the proceedings in the Ohio Supreme Court.

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NO.:

In the Supreme Court of the United States
October Term, 1996

JOHN H. HAPGOOD,
Petitioner,

vs.

CITY OF WARREN,
Respondent.

Appeal to the Supreme Court of Ohio
from the Eleventh Appellate District
Ohio Court of Appeals for Trumbull County

PETITION FOR WRIT OF CERTIORARI

John H. Hapgood, the petitioner herein respectfully prays that a writ of certorari issue to review the judgment of the Ohio Supreme Court, entered in the above-entitled case on March 12, 1997.

OPINIONS BELOW

The March 12, 1997 decision of the Ohio Supreme Court, whose judgment herein is herein sought to be reviewed, was Case No.: 96-2729 decided on March 12, 1997 and is unreported, and is reprinted in the separate Appendix to this Petition, **App. A**. The prior opinion of the Eleventh Appellate District Ohio Court of Appeals, entered on October 28, 1996, was Case No.: 95-T-5355 decided on October 28, 1996.and is unreported, and is reprinted in the separate Appendix to this Petition, **App. B**. The prior opinion of the Court of Common Pleas for Trumbull County, Ohio, entered on October 13, 1995, was Case No.: 93-CV-1999, decided on October 13, 1995, and is unreported, and is reprinted in the separate Appendix to this Petition, **App. C**.

STATEMENT OF JURISDICTION

The judgment of the Ohio Supreme Court was entered on March 12, 1997. The jurisdiction of this Court is involved pursuant to 28 U.S.C. 1257.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

This case involves 29 United States Code 185 (a), and Ohio Revised Code Section 4123.90.

STATEMENT OF THE CASE

Petitioner, John Hapgood was employed as a firefighter for the City of Warren in Trumbull County, Ohio, from March 30, 1992 until his discharge on December 7, 1993. During 1993, Petitioner filed and pursued a workers compensation claim arising from his employment with the City of Warren.

In order to dissuade Petitioner from pursuing his workers compensation claim, respondent City of Warren, through its representatives, threatened petitioner with the loss of his employment unless he voluntarily dismissed or withdrew his workers compensation claim.

Petitioner refused to abandon his workers compensation claim or succumb to the threats of respondent. Consequently, petitioner was terminated by respondent on December 7, 1993.

Petitioner filed a complaint in Trumbull County Common Pleas Court on December 15, 1993, alleging that his termination constituted unlawful retaliation resulting from his pursuit of a workers compensation claim, in violation of Ohio Revised Code Section 4123.90.

Respondent filed a motion for summary judgment on June 23, 1995. It was in this motion for summary judgment that the issue regarding collateral estoppel of petitioner's retaliatory discharge claim was first raised. Respondent maintained that since petitioner participated in the grievance process as outlined in the collective bargaining agreement, based upon his discharge, he was collaterally estopped from pursuing a claim in state court for retaliatory discharge. The relevant C.B.A. did not have jurisdiction to hear his statutory claim of retaliatory discharge, but only to determine whether his discharge was based upon "just cause". The trial court granted respondent's summary judgment motion on October 13, 1995.

Petitioner filed a Notice of Appeal with the Eleventh Appellate District Ohio Court of Appeals on November 1, 1995. Petitioner filed his brief with the Ohio Court of Appeals on January 24, 1996, and raised the collateral estoppel issue in said brief. The Ohio Court of Appeals upheld the summary judgment on respondent's behalf on October 28, 1996.

Petitioner filed his Notice of Appeal with the Ohio Supreme Court on December 12, 1996. Petitioner raised the collateral estoppel issue in his memorandum in support of jurisdiction filed along with said notice of appeal. The Ohio Supreme Court declined jurisdiction to hear petitioner's case on March 12, 1997.

When the highest state court refuses to review an appeal, the intermediate state court of appeals is the highest state court in which a decision could be rendered, and may be reviewed by the U.S. Supreme Court. **Michigan-Wisconsin Pipeline Co. vs. Calvert**, 347 U.S. 157 (1954), **Sullivan vs. Texas**, 207 U.S. 416 (1908), **Clark vs. Pennsylvania**, 128 U.S. 395 (1988), **Cuyahoga River Power Co. vs. Northern Realty Co.**, 244 U.S. 300 (1917), **Gregory vs. McVeigh**, 90 U.S. 294 (1874). Therefore, the jurisdiction of this Court is proper.

REASONS FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED BECAUSE OHIO COURTS HAVE DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH THE DECISIONS OF SEVERAL OTHER STATE COURTS OF LAST RESORT, SEVERAL UNITED STATES CIRCUIT COURTS OF APPEAL, AND THE UNITED STATES SUPREME COURT.

The issue in this case is whether an employee who uses a grievance procedure as outlined in a collective bargaining agreement is then barred from filing a claim in state court for retaliatory discharge when he is fired for filing a workers compensation claim.

The case of **Lingle vs. Norge Division, Magic Chef**, 486 U.S. 399 (1988) is directly on point. In **Lingle**, as in the instant case, an employee was discharged on the grounds of filing a false workers compensation claim. A grievance was filed under the union's collective bargaining agreement, and a state court action was filed against the employer on the grounds of retaliatory discharge for exercising rights under the workers compensation statute.

The U. S. Court of Appeals in **Lingle** stated that the employee's state law claim was pre-empted by Section 301 of the Labor - Management Act of 1947 [29 U.S.C. 185 (a)] because the same analysis of the facts is implicated under both the procedures of a just cause hearing for a collective bargaining agreement provision and a state - law action for retaliatory discharge. **Id.** at 402. This Court rejected this rationale, **Id.** at 423.

Although the Ohio Court of Appeals in the instant case made no reference to Section 301, it did rule that petitioner was collaterally estopped from pursuing a claim for retaliatory discharge because he also filed a collective bargaining agreement grievance, because both involved the same issue of his being fired for filing a workers compensation claim. Thus, the fact-patterns are identical, except for the fact that the employee in **Lingle** was successful at her just cause hearing. However, this factor was not relevant in this Court's analysis in **Lingle**. In fact, this Court stated that "even if an arbitrator should conclude that the contract does not prohibit a particular discriminatory or retaliatory discharge, that conclusion might or might not be consistent with a proper interpretation of state law." **Lingle**, 486 U.S. at 413.

This Court overturned the lower court's decision in **Lingle** and ruled that:

> [E]ven if dispute resolution pursuant to a colletive-bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is "independent" of the agreement for Section 301 pre-emption purposes.... Today's decision should make clear that interpretation of collective bargaining agreements remains firmly in the arbitral realm; judges can determine questions of state law involving labor-management relations only if such questions do not require construing collective - bargaining agreements.

Id. at 410-411.

This Court went on to note that "there is nothing novel about recognizing that substantive rights in the labor relations context can exist without interpreting collective-bargaining agreements." **Id.** at 411. This Court ruled that

the emplyee's retaliatory discharge claim for asserting workers compensation rights was not pre-empted by Section 301 or the collective bargaining agreement grievance hearing because "a state tribunal could resolve either a discriminatory or retaliatory discharge claim without interpreting the "just cause" language of a collective bargaining agreement." **Id**. at 413.

In the instant case, the Ohio Court of Appeals held that petitioner could not maintain a state claim for retaliatory discharge because he was unsuccessful in his grievance hearing, and under the **Lingle** decision, this ruling must be overturned.

The facts that Ohio Courts are being inconsistent with a prior U.S. Supreme Court ruling should be sufficient for this Court to grant certiorari.

In addition, Ohio courts are being inconsistent with the rulings of several U.S. Circuit Courts of Appeals, including the U.S. Court of Appeals for the Sixth Circuit.

The Sixth Circuit noted in **Knafel vs. Pepsi-Cola Bottlers**, 899 F. 2d 1473, 1482 (6th Cir. Ohio 1990) that Ohio Revised Code Section 4123.90, which prohibits the retaliatory discharge of an employee who files a workers compensation claim, is similar to the Illinois statute in

dispute in **Lingle**. The Sixth Circuit held that "Proving the elements of a retaliatory discharge claim under Ohio Rev. Code Section 4123.90, as in **Lingle**, does not require an interpretation of the collective bargaining agreement....." and therefore O.R.C. Section 4123.90 claims are not pre-empted because the resolution of this state law claim is not "inextricably intertwined" with the terms of the collective bargaining agreement. **Knafel**, 899 F. 2d at 1482. The **Knafel** court went on to state that even if a collective bargaining agreement did not exist, "the Ohio statute would confer certain non negotiable rights and duties upon all employees (whether organized or not) and employers." **Id.** Since the Sixth Circuit in **Knafel** held that proving the elements of a retaliatory discharge claim under O.R.C. Section 4123.90 does not require the interpretation of a collective bargaining agreement, this also mandates the overturning of the Ohio Court of Appeals decision in the instant case that a collective bargaining agreement grievance hearing bars the filing of a state law retaliatory discharge claim.

Indeed, it should be noted that in **Knafel**, the collective bargaining agreement arbitration found that the employee was fired for just cause, **Id**. at 1476, as in the instant case. Therefore, petitioner should be allowed to continue with his retatiatory discharge claim under O.R.C. Section 4123.90.

The Sixth Circuit also earlier held in **Smolarek vs. Chrysler Corp**., 879 F. 2d 1326 (6th Cir. Mich. 1989), that Section 301 of the Labor-Management Relations Act does not pre-empt a retaliatory discharge claim when one is fired for asserting workers compensation rights. The **Smolarek** court held that a retaliatory discharge claim of a worker fired after filing a workers compensation claim is an issue involving purely factual questions pertaining "to the conduct of the employee and the conduct and motivation of the employer. Neither of the elements requires a court to interpret any term of a collective-bargaining agreement." **Id**. at 1331, citing **Lingle**, 486 U.S. at 407.

The Sixth Circuit went on to note that "here, as in **Lingle**, the state-law tort of retaliatory discharge creates rights independent of those established by the collective bargaining agreement and hence is not pre-empted by Section 301." **Smolarek**, 879 F. 2d at 1331.

Other instances where U.S. Courts of Appeal have held that a state law claim of retaliatory discharge after asserting workers compensation rights is not pre-empted by Section 301 include the Fifth Circuit in **Jones vs. Roadway Express**, 931 F. 2d 1086 (5th Cir. Texas 1991) and in **Green vs. Amerada Hess Corp**., 707 F. 2d 201 (5th Cir. Miss. 1983), and the Third Circuit in **Herring vs. Prince Macaroni of N.Y**. 799 F. 2d 120 (3rd Cir. N.J. 1986).

Also, Ohio Courts are interpreting a federal question in a way that conflicts with the decisions of other state courts of last resort. Courts that have held that an injured employee is not pre-empted from filing a state retaliatory discharge claim when fired after filing a workers compensation claim include the Missouri Supreme Court in **Cook vs. Hussman Corp**., 852 S. W. 2d 342 (Mo. bank 1993), the Illinois Supreme Court in **Ryherd vs. General Cable Co.**, 530 N.E. 2d 431 (Ill.1988) and in **Midgett vs. Sackett-Chicago Inc**., 473 N.E. 2d 1280 (Ill.1984), the Nevada Supreme Court in **MGM Grand Hotel-Reno vs. Insley**, 728 P. 2d 821 (Nev. 1986), the Iowa Supreme Court in **Conaway vs. Webster City Products Co**., 431 N.W. 2d 795 (Iowa 1988), the New York Supreme Court in **Valentino vs. American Airlines**, 520 N.Y.S. 2d 230 (1987), and by the Kansas Supreme Court in **Coleman vs. Safeway Stores, Inc.,** 752 P. 2d 645 (Kan. 1988).

Thus, certiorari should be granted to review this shocking dismissal by the Ohio courts of precedents set by the U.S. Supreme Court, the U.S. Sixth Circuit Court of Appeals and other federal circuit courts of appeal and state courts of last resort.

An argument that may be advanced by respondent that the instant case merely holds that an unsuccessful grievance hearing on the issue of dismissal after filing a workers

compensation claim collaterally estops an employee from filing a state-law retailiatory discharge claim on the same issue should not be considered by this Court. This is the same fact-pattern as in **Knafel**, and the Sixth Circuit held that the employee may proceed with a retaliatory discharge claim even after an unsuccessful discharge claim on the same issue. **Knafel**, 899 F. 2d at 1476, 1482. In addition, this Court indicated that an employee may bring a state-law claim on the issue of retaliatory discharge even if unsuccessful at the arbitration. **Lingle**, 486 U.S. at 413.

As this Court also noted in **Lingle**, the state-law remedy of retaliatory discharge "is 'independent' of the collective-bargaining agreement in the sense of 'independent' that matters for Section 301 pre-emption purposes: resolution of the state - law claim does not require construing the collective bargaining agreement." **Lingle**, 486 U.S. at 407.

Also, if the Ohio Court of Appeals is correct that victory at a grievance hearing for employers on the issue of unjust discharge is collateral estoppel and bars employees from filing a complaint on this issue, then collateral estoppel would also have to apply if an employee wins a grievance hearing. Thus, a victory at a grievance hearing by an employee fired after filing a workers compensation claim would allow employees to file retaliatory discharge complaints in state court, then immediately file summary

judgment motions based on collateral estoppel, and proceed to a trial on damages.

Collateral estoppel based on a collective bargaining agreement grievance hearing has to work both ways. It cannot be applied only if employers win a grievance hearing, but not if employees do.

CONCLUSION

WHEREFORE, for the foregoing reasons, petitioner respectfully prays that his petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

JUDGMENT ENTRY
OHIO SUPREME COURT
MARCH 12, 1997

THE SUPREME COURT OF OHIO

1997 TERM

John H. Hapgood,	)	
Appellant,	)	Case No. 96-2729
	)	
v.	)	ENTRY
	)	
City of Warren,	)	
Appellee.	)	

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case.

COSTS:

Docket Fee, $40.00, paid by Mark S. Colucci.

(Trumbull County Court of Appeals; No. 95T5355)

/s/THOMAS J. MOYER
Chief Justice

APPENDIX B

OPINION AND JUDGMENT ENTRY
ELEVENTH APPELLATE DISTRICT
OHIO COURT OF APPEALS
OCTOBER 28, 1996

COURT OF APPEALS

ELEVENTH DISTRICT

TRUMBULL COUNTY, OHIO

JOHN H. HAPGOOD,

Plaintiff-Appellant,

- vs -

CITY OF WARREN,

Defendant-Appellee.

JUDGES

HON. DONALD R. FORD, P.J.,
HON. JUDITH A. CHRISTLEY, J.,
HON. ROBERT A. NADER, J.

CASE NO. 95-T-5355

OPINION

CHARACTER OF PROCEEDINGS: Civil Appeal from Court of Common Pleas No. 93 CV 1999

JUDGMENT: Affirmed.

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FORD, P.J.

Appellant, John H. Hapgood, appeals from an order of the Trumbull County Court of Common Please, granting summary judgment in favor of appellee, the City of Warren, in a retaliatory discharge action under R.C. 4123.90.

Appellant worked as a firefighter from March 30, 1992 until December 7, 1993, his date of discharge.[1] In January 1993, appellant began to experience lower back pain. On March 31, 1993, Dr. Patrick A. Ensmiger, D.C., explained appellant, who advised the doctor that the lower back pain, which radiated into his left leg, began insidiously, and became aggravated when he ran, jogged, or sat in an easy chair. Dr. Ensmiger determined that appellant was suffering from lumbar facet syndrome and lumbar radiculitis. Appellant sought a second opinion from Dr. Robert J. Brocker, M.D., whose examination revealed degenerative spondylotic disc disease. Dr. Brocker also said that appellant's condition was hereditary and not work-related. Appellant required surgery for this condition.

On May 13, 1993, Community Mutual sent appellant a questionnaire designed to determine whether appellant's

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[1] The facts stated in this opinion are drawn from the arbitrator's opinion and award dated August 20, 1994.

claims were work-related or caused by the negligent or wrongful conduct of another. Appellant responded on May 26, 1993, a few days after his surgery, that his treatment was not required as a result of an accident or work-related injury or illness.

Appellant returned to work on June 4, 1993, and was assigned to light duty which continued throughout the summer. Apparently appellant never filed an injury report concerning his back problem. On September 27, 1993, Chief Kent Fusselman questioned appellant regarding whether he had obtained a doctor's slip and whether appellant had ever completed a light duty form. Chief Fusselman indicated light duty assignments were within the chief's discretion.

A second meeting was held with appellant on September 30, 1993. Appellant was questioned about the light duty form which he had submitted on September 27, 1993, but which was dated September 15, 1993. Other questions concerned appellant's recuperative potential and his ability to return to full-time status without restrictions. A predisciplinary hearing was held on October 6, 1993, regarding appellant's withholding of a light duty sick slip. Appellant maintained that his problem was genetically based and not work-related. A verbal reprimand was issued on October 12, 1993.

Appellant submitted a claim for workers' compensation benefits on October 15, 1993. In describing the accident, appellant stated:

> "I was stepping off of a fire truck dressed with all of my gear. The step I took is a rather high step as I came down I felt pain in my back. After while (sit) [sic] sitting was a [sic] in a chair at the fire station I noticed some continued pain in my back. Shortly thereafter I was running (sic) at work when I noticed. [Sic.] After completing my run and after working out in the weight room I was experiencing left leg pain."

A second predisciplinary hearing was conducted on November 29, 1993, concerning proposed charges for falsification of records and gross neglect of duty. Appellant was discharged on December 7, 1993.

Appellant filed a grievance under his union's collective bargaining agreement, arguing that he was discharged without just cause.[2] The matter proceeded to binding arbitration on May 12, 1994. After considering the evidence, the testimony of the witnesses and the briefings of the parties, the arbitrator overruled appellant's grievance

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[2] Article XI, Section 1 of the collective bargaining agreement.

finding that appellant had falsified his workers' compensation application and had been properly discharged for just cause.[3]

Appellant also filed a complaint with the Ohio Civil Rights Commission, charging his employer with having discharged him in retaliation for filing or pursuing a workers' compensation claim. On December 15, 1994, the commission dismissed appellant's discrimination charge, ruling that just cause existed for appellant's discharge. The commission then refused to reconsider its decision on February 2, 1995. Additionally, the discrimination charge was reviewed by the Equal Opportunity Employment Commission ("EEOC"). After conducting an independent examination of the evidence presented to the Ohio Civil Rights Commission, the EEOC determined that there was insufficient evidence to establish a violation of the Americans with Disabilities Act ("ADA").[4]

Appellant filed a complaint in the Trumbull County Court of Common Pleas on December 15, 1993, which alleged: 1) retaliatory discharge by appellee based on appellant's pursuit of a workers' compensation claim, in

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[3] Factfinder's Opinion and Award, dated August 20, 1994.

[4] Determination, dated June 29, 1995.

violation of R.C. 4123.90; and 2) tortious conduct by appellee. The trial court granted summary judgment for appellee on October 17, 1995.[5] Appellant filed a timely appeal and raises two assignments of error:

> "1. The trial judge erred in granting [appellee's] motion for summary judgment.
>
> "2. The doctrine of [collateral] estoppel does not apply, based upon the decision of the arbitrator in appellant's collateral discharge proceeding."

As a preliminary matter, we note that appellant has attached certain appendices to his brief that are inappropriate as they are unnecessarily duplicative of the materials that are attached to appellant's memorandum opposing appellee's motion for summary judgment. Loc.R. 12(B)(1).[6] We urge appellant's counsel to refrain from presenting unnecessary submissions in the future.

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[5] Also during the pendency of the instant action, appellant filed a lawsuit against appellee in the United States District Court for the Northern District of Ohio, Case Number 4:95 CV 2090, which concerns, in part, a claim under the Americans with Disabilities Act. That lawsuit is still pending.

[6] The attached submissions include: 1) appellant's chronology of events leading to his employment discharge; 2) the arbitrator's opinion and award, dated August 20, 1994; 3) portions of the deposition testimony of appellant and appellee's representative, Gary Cicero.

Additionally, appellant has failed to comply with App.R. 12(A)(2) and App.R. 16(A)(7). Appellant refers to the appendices attached to his brief to reference the alleged errors. However, the rule requires that the appellant cite the documents as they are found in the record. Additionally, since appellant attached only small portions of the deposition testimony to his motions to the trial court, our review and decision will accordingly be limited to an examination of those portions and the balance of the evidentiary submissions.

We will discuss the assignments in reverse order for purposes of our review. In the second assignment, appellant essentially argues that the doctrine of collateral estoppel does not apply to his retaliatory discharge action because the trial court action involves slightly different issues than were involved in the "just cause" arbitration proceeding. In *Peterson v. Camelot Court Dev., Inc.* (Nov. 10, 1994), Lake App. No. 93-L-155, unreported, at 5, this court construed the doctrine of collateral estoppel as follows:

> "The collateral estoppel branch of *res judicata*, dictates that '(***) material facts or questions which were in issue in a former suit, and were there judicially determined by a court of competent jurisdiction, are conclusively settled by a judgment therein so far as concerns the parties to

that action (***).' *Goodson v. McDonough Power Equip. Inc.*, (1983), 2 Ohio St.3d 193, 195."

In *Stevenson v. Pace Eng., Inc.* (Nov. 4, 1994), Lake App. No. 93-L-165, unreported, at 3, we stated:

"In order to successfully assert collateral estoppel, a party must prove:

"'(1) The party against whom estoppel is sought was a party or in privity with a party to the prior action;

"'(2) There was a final judgment on the merits in the previous case after a full and fair opportunity to litigate the issue;

"'(3) The issue must have been admitted or actually tried and decided and must be necessary to the final judgment; and

"'(4) The issue must have been identical to the issue involved in the prior suit.'***

"The doctrine of collateral estoppel is applicable to administrative proceedings. ***"

(Citations omitted.)

In *May v. Brainard Rivet Co.* (Sept. 16, 1988), Trumbull App. No. 3918, unreported, an employee alleged that he was discharged in retaliation for having filed a workers' compensation claim against his employer. The claim was submitted to arbitration, where the arbitrator determined that the employee had been discharged for just cause. Thereafter, the employee filed a claim under R.C. 4123.90 charging retaliatory discharge as the cause of action, based on the employee's pursuit of a workers' compensation claim. This court held that:

> "Other cases appellant cites also state that the collateral estoppel doctrine does not apply when the second action concerns a slightly different issue. In this case, however, appellant has raised the same issue in his first claim that was litigated in the OBES proceedings: was he discharged without just cause? Appellant contends that whether he was fired because of the workers' compensation claim is a different issue. But this assertion is just a different theory on the same issue. Appellant should have presented this theory to the board of review, which could have then determined whether this was the reason appellant was fired. Under the collateral estoppel doctrine, the failure to raise a different

theory waives it, and appellant cannot assert it simply by labeling it as a cause of action." *Id.* at 5-6.

After reviewing the record, we determine that the doctrine of collateral estoppel is applicable to appellant's retaliatory discharge claim. Appellant has also failed to argue exactly how the issues in the instant action are different from those in the previous proceedings. We believe that the issues and facts concerning the falsified workers' compensation claim are sufficiently intertwined with the issues and facts which would have to be determined under R.C. 4123.90 action to require the application of the doctrine. In our opinion, the facts that would be pertinent to appellant's retaliatory discharge claim are the same facts that the arbitrator considered. Additionally, the issue is essentially the same, *i.e.*, the reason for appellant's discharge, even though appellant has attempted to characterize the issue as being different simply by submitting the issue under a different claim and asserting that his discharge was for another reason. The evidence supports the conclusion that appellant was fired because of filing a false workers' compensation claim, not because of the filing of the claim in and of itself. Because appellant has already received one binding decision from arbitration, and two administrative decisions prior to bringing the instant action, and all four proceedings have involved the

same parties, we conclude that collateral estoppel is applicable.

We are aware of the decision in *Truax v. EM Industries, Inc.* (1995), 107 Ohio App.3d 210. In *Truax*, the First District Court of Appeals held that an arbitrator's finding of just cause for the termination of an employee does not preclude that employee from bringing a subsequent suit under R.C. 4123.90. *Id.* at 218. The *Truax* court relied on the reasoning articulated by the Supreme Court of the United States in *Alexander v. Gardner-Denver Co.* (1974), 415 U.S. 36, stating that, "[t]he *Gardner-Denver* line of cases indicates that the issues decided in an arbitration involving a grievance under a collective-bargaining agreement and a statutory claim for retaliatory discharge are not the same." *Id.* at 217. However, an additional cogent factor in the instant case is that the arbitration proceeding and the retaliatory discharge action involve the same subject matter, *i.e.*, the falsified workers' compensation application, and, therefore, both proceedings necessarily involve the same issues.

Appellant contends that the *May* decision, based on waiver, is inapplicable here because he filed his cause of action immediately after the discharge and before the matter proceeded to arbitration. However, the reason for the discharge has already been determined by the arbitrator, and

we believe that relitigation of the same facts and issues is not permissible. Appellant's second assignment of error is without merit.

In the first assignment, appellant argues that summary judgment was improperly granted. Civ.R. 56(C) provides, in pertinent part:

> "Summary judgment shall be rendered forthwith if the pleading [sic], depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion of summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor."

The Supreme Court of Ohio recently set forth the

burden that is placed on each party in a summary judgment action. In *Dresher v. Burt* (1996), 75 Ohio St.3d 280, the court held:

> "*** [A] party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims. The moving party cannot discharge its initial burden under Civ.R.56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case. Rather, the moving party must be able to specifically point to some *evidence* of the type listed in Civ.R. 56(C) which affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. However, if the moving party has satisfied its initial burden, the nonmoving party then has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if appropriate, shall be entered against the nonmoving

party." (Emphasis *sic.*) *Id.* at 293.

In the instant case, appellee's summary judgment motion and the supplemental to that motion contain the requisite references to the record. However, appellant failed to satisfy its evidential burden in its response to appellee's summary judgment motion. In order to succeed in an action brought under R.C. 4123.90, appellant must offer proof that he was injured on the job, that he filed a workers' compensation claims, and that he was fired because of it. *Kilbarger v. Anchor Hocking Glass Co.* (1995), 107 Ohio App.3d, 763, 767.

Initially, we note that the reasoning in the second assignment supports the conclusion that appellee was entitled to judgment as a matter of law. Additionally, appellant's submission of only those pages of the various witness depositions testimonies which arguably support appellant's contentions, is disingenuous. We cannot determine the scope and context of the entire line of questioning posed to each witness from these deficient submissions. Further, appellant's unsworn chronology of the events leading to his discharge is not the proper type of evidence required to rebut a summary judgment motion.

Finally, appellant failed to submit a complete copy of the pertinent provisions of the collective bargaining

agreement. R.C. 4117.10 provides, in part, that:

> If the agreement provides for a final and binding arbitration of grievances, public employers, employees, and employee organizations are subject solely to that grievance procedure and the state personnel board of review or civil service commissions have no jurisdiction to receive and determine any appeals relating to matters that were the subject of a final and binding grievance procedure. Where no agreement exists or where an agreement makes no specification about a matter, the public employer and public employees are subject to all applicable state or local laws or ordinances pertaining to the wages, hours, and terms and conditions of employment for public employees. Laws pertaining to *** workers' compensation ***
>
> prevail over conflicting provisions of agreements between employee organizations and public employers."

Since appellant failed to produce evidence which would demonstrate otherwise, we are compelled to presume that appellant's right to pursue a R.C. 4123.90 action is subsumed within an applicable provision of the collective bargaining agreement. The fact that the arbitrator declined

to make a determination based on appellant's allegation of anti-workers' compensation animus,[7] leads us to believe that he was imbued with the authority to make such a finding if sufficient evidence had been presented, and that such a determination would have fallen within the scope of his authority under the provisions of the collective bargaining agreement.[8] Accordingly, appellant's first assignment of error is without merit.

Based on the foregoing reasoning, the judgment of the trial court is affirmed.

/s/Donald R. Ford
PRESIDING JUDGE DONALD R. FORD

CHRISTLEY, J., NADER, J., concur.

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[7] The arbitrator's decision stated: "The Union failed to provide this Arbitrator with sufficient detail regarding the other pending legal matters involving claims and dismissals of other employees. The record does not provide one with sufficient information to determine whether the Grievant and individuals are similarly situated. As such, the Arbitrator declines to consider whether the Grievant's situation resulted from an explicit anti-workers' compensation animus."

[8] See, *Austin v. Owens-Brockway Glass Container, Inc.* (C.A.4 1996), 78 F.3d 875. In *Austin*, the Fourth Circuit Court of Appeals held that when a collective bargaining agreement expressly lists statutory claims, e.g. gender and discrimination claims, as ones that are subject to arbitration, then arbitration of such claims is mandatory, and the employee is required to pursue such claims in the arbitral forum.

STATE OF OHIO)
)SS.
COUNTY OF TRUMBULL)

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

JOHN H. HAPGOOD,
Plaintiff-Appellant,

- vs -

CITY OF WARREN,
Defendant-Appellee.

JUDGMENT ENTRY
CASE NO. 95-T-5355

For the reasons stated in the Opinion of this court, the assignments of error are without merit, and it is the judgment of this court that the judgment of the trial court is affirmed.

/s/Donald R. Ford
PRESIDING JUDGE DONALD R. FORD
FOR THE COURT

APPENDIX C

JUDGMENT ENTRY
TRUMBALL COUNTY COURT
OF COMMON PLEAS
OCTOBER 13, 1995

COURT OF COMMON PLEASE OF
TRUMBULL COUNTY, OHIO

DOCKET AND JOURNAL ENTRY

JOHN H. HAPGOOD - Plaintiff

vs.

CITY OF WARREN - Defendant

CASE NO. 93-CV-1999

JOURNAL VOL.___PAGE___

DATE OF REQUEST_____19__

Defendant's motion for summary judgment granted. Costs to plaintiff.

APPROVED:

_____ /s/W. Wyatt McKay
Attorney-For Plaintiff Judge

_____ 10-13-95
Attorney-For Defendant Date of Signature

APPENDIX D

29 U.S.C. 185(A)

29 UNITED STATES CODE 185

Section 185. Suits by and against labor organizations

(a) Venue, amount, and citizenship. Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agents; entity for purposes of suit; enforcement of money judgments. Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction. For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such a organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of process. The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency. For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

APPENDIX E

O.R.C. SECTION 4123.90

OHIO REVISED CODE 4123.90

SECTION 4123.90 Discrimination against alien dependents unlawful.

The bureau of workers' compensation, industrial commission, or any other body constituted by the statutes of this state, or any court of this state, in awarding compensation to the dependents of employees, or others killed in Ohio, shall not make any discrimination against the widows, children or other dependents who reside in a foreign country. The bureau, commission, or any other board or court, in determining the amount of compensation to be paid to the dependents of killed employees, shall pay to the alien dependents residing in foreign countries the same benefits as to those dependents residing in this state.

No employer shall discharge, demote, reassign, or take any punitive action against any employee because the employee filed a claim or instituted, pursued or testified in any proceedings under the workers' compensation act for an injury or occupational disease which occurred in the course of and arising out of his employment with that employer. Any such employee may file an action in the common pleas court of the county of such employment in which the relief which may be granted shall be limited to reinstatement with back pay, if the action is based upon discharge, or an award

for wages lost if based upon demotion, reassignment, or punitive action taken, offset by earnings subsequent to discharge, demotion, reassignment, or punitive action taken, and payments received pursuant to section 4123.56 and Chapter 4141. of the Revised Code plus reasonable attorney fees. The action shall be forever barred unless filed within one hundred eighty days immediately following the discharge, demotion, reassignment, or punitive action taken, and no action may be instituted or maintained unless the employer has received written notice of a claimed violation of this paragraph within the ninety days immediately following the discharge, demotion, reassignment, or punitive action taken.